77-507

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1977

KARL BRUNO,

Petitioner,

vs.

HAYIM KALMICH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Karl Bruno, Petitioner, by and through his attorneys, Louis A. Smith, Lester E. Munson and James G. Meyer, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 25, 1977.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois is reported at 404 F. Supp. 57.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 553 F. 2d 549.

An order of the Court of Appeals for the Seventh Circuit denying a Petition for Rehearing was entered on June 28, 1977.

JURISDICTION

A copy of the judgments and opinions of the District Court and the Court of Appeals are appended to this Petition in the Appendix at pp. 1a, 18a. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

In 1972, the plaintiff brought this diversity action against the defendant in the United States District Court for the Northern District of Illinois, based upon the alleged taking of his textile business by the defendant in Belgrade, Yugoslavia in 1942. The plaintiff's suit is based upon certain statutes of Yugoslavia creating a cause of action for the alleged conversion of the property. The plaintiff also alleged, that certain Yugoslav Statutes create a perpetual statute of limitation that now allows him to pursue this action in the Federal Courts. The defendant contends that the statute of limitation pled by the plaintiff is not a part of the substantive law and therefore the statute of limitation of the forum should be applied. The District Court found the statute of limitation plead by the plaintiff was not part of the substantive law and applied the forum statute which caused the dismissal of this action. The Court of Appeals reversed finding, that the Yugoslav statute of limitation was part of the substantive law that created the cause of action and remanded the case. The questions presented are:

1. Whether the opinion of the Court of Appeals is in conflict with this Courts' holding in *Davis* v. *Mills* (1904) 194 U.S. 451, 24 S. Ct. 692, 48 C. Ed. 1067.
2. Whether the opinion of the Court of Appeals will require the District Court to adjudicate the Defendant's guilt under provisions of the Yugoslav Criminal Code.

STATUTES INVOLVED

Ill. Rev. Stat. (1973), Ch. 83, Par. 16.

> Oral contracts-Arbitration awards-Damages to property-Possessory actions-Civil actions. § 15. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

Ill. Rev. Stat. (1973), Ch. 83, Par. 21.

> Barred foreign actions. § 20. When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.

Yugoslav Criminal Code, Article 125.

> Whoever in violation of the rules of international law at the time of war, armed conflict or occupa-

tion, orders or executes willful killings, tortures or inhuman treatment of the civilian population, including therein biological experiments, causing great suffering or serious injury to body or health; unlawful deportation, transfers, forcible denationalization or conversion of the population to another faith; rape or compulsion to prostitution; use of measures of intimidation and terror, taking of hostages, collective penalties, unlawful taking to concentration camps and other unlawful confinements, deprivations of rights to a fair and impartial trial; compulsive enlistment in the armed forces of an enemy power, in its intelligence service or administration; coercion to compulsive labour; exposition of the population to starvation, confiscation of property, pillage, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs, imposition of unlawful and disproportionately large contribution and requisitions, devaluation of domestic currency, or the unlawful issuance of currency, ... shall be punished by strict imprisonment for not less than five years or by death penalty

(Translation by the Institute of Comparative Law, Belgrade, 1964 Ed.)

Yugoslav Criminal Code, Article 134(a).

Criminal prosecution and enforcement of punishment for crimes provided for by Articles 124-128 of the present Code are not subject to the statute of limitation.

(Translation by George Jovanovich, Senior Legal Specialist, Library of Congress, Law Library, European Law Division).

Yugslav, Law Concerning the Treatment of Property Abandoned During the War or Property Taken

Away From The Owners by the Enemy or its Helpers, Section 1.

Sec. 1 All properties of physical persons and legal entities in the territory of the Federal People's Republic of Yugoslavia which had to be abandoned by their owners or holders during the occupation of the country; property taken away from such persons against their will by the occupying force and its helpers, with or without compensation, for racial, religious, national or political reasons; as well as property which under the pressure of the occupying force, by legal acts or otherwise, passed into the hands of third parties, shall be returned to the respective owners or tenants immediately, regardless of who holds their property and on what grounds, on the day when this Law becomes effective. (August 16, 1946).

Property shall not be considered abandoned if the absentee owner left an authorized agent.
Citizens of the F. P. R. Y. residing abroad who were not registered with the representatives of the F. P.R. Y. in the state of their residence and who were not willing to comply with the request for their return home shall not be able to request the return of property through an authorized agent.

If property was destroyed, damaged or could not be found, the owner may bring action for damages against responsible persons without losing the right to claim war damage.

Property, in the sense of the present Law, means especially real property, such as land, houses, agricultural farms, forests, industrial enterprises with all installations; (it also means) personal property, such as furniture, securities, jewelry, claims, shares and partnership interests, copyrights, rights of industrial property, shares

with their inventories, and other rights in property.

(Translation by George Jovanovich, Library of Congress.)

Yugoslav, Law Concerning the Statute of Limitations, Section 14.

Claims shall be barred after the expiration of a 10-year period, unless otherwise specifically provided for by law.

(Translation by George Jovanovich, Library of Congress.)

Yugoslav, Law Concerning the Statute of Limitations, Section 19.

Action for the recovery of damages shall be barred after the expiration of 3 years after (the time) the plaintiff learned about the damage and the person causing it.

In any event such action shall be barred after the expiration of 10 years after the day the cause of action accrued.

Action for recovery of damages for breach of contract shall be barred after the expiration of the time specified for such action.

(Translation by George Jovanovich, Library of Congress.)

Yugoslav, Law Concerning the Statute of Limitations, Section 20.

If the damage was caused by a criminal act, and a longer period of time was provided for the prosecution of a crime, then an action for the recovery of damages shall be barred when the time for the prosecution of the crime expires.

The stalling of the statute of limitation for the prosecution of a crime entails the stalling of the statute of limitation for a (civil) action to recover damages.

The same rule applies to an action for preventing the running of the statute of limitation.

(Translation by George Jovanovich, Library of Congress.)

STATEMENT

This is a diversity case between the plaintiff, a citizen of Quebec, Canada, and defendant, a citizen of Illinois, in which the plaintiff seeks damages under certain statutes of Yugoslavia for the defendant's alleged unlawful purchase of the plaintiff's business in 1942. This action is brought some 30 years after the alleged unlawful conduct.

To overcome the defense that this action was barred by lapse of time, the plaintiff pled various Yugoslav Civil and Criminal Statutes which, he contends, creates a perpetual cause of action against the defendant. The plaintiff contended:

1. That sometime after 1942, the nation of Yugoslavia enacted Article 125 of the Criminal Code which provides that anyone who confiscated another's belongings during World War II would be subject to criminal prosecution.

2. That in 1965, Yugoslavia enacted Article 134(a) of the Criminal Code which provides that there shall be no statute of limitation for prosecution for violation of Article 125;

3. That in 1946, Yugoslavia enacted a law (Section 1 of the Law Concerning Treatment of Property Aban-

doned During the War or Property, Taken Away from the Owner by the Enemy on its Helpers), providing a civil cause of action for those whose belonignгs were confiscated by the German Occupation Force in World War II; and

4. That in 1953, Yugoslavia enacted Section 20 providing that the statute of limitation on criminal actions shall serve as the statute of limitation in civil actions if the conduct complained of in the civil action "could" subject the defendant to a criminal prosecution.

The District Court, sitting in Illinois, dismissed the complaint for failure to state a cause of action on the basis that the claim was barred by the pertinent Illinois statute of limitation. The Court found that the Yugoslavian law asserted by the plaintiff was not so specifically directed to the civil action as to warrant a finding that it qualified that right, relying on *Davis* v. *Mills* (1904) 194 U.S. 451, 24 S. Ct. 692, 48 L. Ed. 1067.

On appeal, a majority of the Seventh Circuit Court of Appeals (Fairchild, Chief Judge and Pell, Circuit Judge), reversed the District Court and found that the four provisions of Yugoslavian law asserted by the plaintiff were so specifically directed to the civil action as to find that it qualified that right under the test announced in *Davis* v. *Mills, Supra,* and therefore the action was not barred by the Illinois statute. In a dissenting opinion, Circuit Judge Swygert agreed with District Judge Flaum's conclusion, that Section 20 of the Yugoslavian statute of limitation was a general statute of limitation, inapplicable in this case.

REASONS FOR GRANTING THE WRIT

The decision of the Court below should be reviewed because it erroneously applies the principles announced by this Court in *Davis* v. *Mills* (Supra) and the Illinois Supreme Court in *Smith* v. *Toman* (1938) 368 Ill. 414, 16 N.E. 2d 478. The decision is in conflict with the *Davis* opinion and similar Illinois Authority and, if allowed to stand, would force the District Court to adjudicate the defendant's guilt or innocence under the criminal laws of Yugoslavia.

I. THE MAJORITY OPINION OF THE COURT OF APPEALS MIS-APPLIED THIS COURT'S OPINION IN DAVIS V. MILLS (1904) 194 U.S. 451, 24 S. Ct. 692, 48 L. ED. 1067, WHEN IT HELD THAT THE YUGOSLAVIAN LAW ASSERTED BY THE PLAINTIFF WAS SO SPECIFICALLY DIRECTED TO THE STATUTORY CAUSE OF ACTION AS TO BE A PART OF THE SUBSTANTIVE LAW.

The instant action, based on diversity jurisdiction, requires the application of the law of the State of Illinois. *Erie Ry. Co.* v. *Tompkins,* (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. This rule governs in determining choice of law questions, with the result that in such cases a federal court applies the *lex loci* or the *lex fori* precisely as would a court of the forum state. *Bernhardt* v. *Polygraphic Co. of America,* (1956), 76 S. Ct. 273, 350 U.S. 198, 100 L. Ed. 119. Therefore, a claim which is unenforceable in the courts of the state in which the federal court sits is equally unenforceable in the federal court. *Klaxon Co.* v. *Stentor Electric Co.* (1941) 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; *Guaranty Trust Co.* v. *York,* (1945), 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 1188.

The appropriate Illinois statute provides that actions to recover damages for an injury done to property, real or personal, has a five (5) year limitation. (Ill. Rev. Stat. (1973), Ch. 83, par. 16). Further, Ill. Rev. Stat. (1973), Ch. 83, par. 21, provides that where an action arose in a foreign country and the law therefore bars such an action, the action cannot be maintained in Illinois.

It is also equally clear that the instant action is barred by the Yugoslavian Statute of Limitations. Section 14 of the Law Concerning the Statute of Limitation provides: "Claims shall be barred after the expiration of a 10-year period, unless specifically provided for by law." Section 19 of the same law provides: "Action for the recovery of damages shall be barred after the expiration of 3 years after (the time) the plaintiff learned about the damage and the person causing it. In any event such action shall be barred after the expiration of 10 years after the day the cause of action accrued." (Translation of the Law Concerning the Statute of Limitations by George Jovanovich, Senior Legal Specialist, European Law Division, Law Library, Library of Congress).

The plaintiff's complaint alleges that this cause of action arose in 1942, some 35 years ago. It is obvious that considered in light of any of the above statutes, the plaintiff's claim is now barred.

In order to maintain his cause of action under Sec. 1 of the Yugoslavian law the plaintiff asserts that Sec. 20 of the civil law and Articles 125 and 134(a) of the Yugoslavian Criminal Code apply to create a cause of action with no limitation period, i.e., a perpetual cause of action.

Illinois' courts have consistently characterized statutes of limitation as "procedural in their nature", and have applied the limitations' period of the forum state, even when the cause of action to which they applied may have arisen in and been governed by the substantive law of another jurisdiction. *Hilberg* v. *Industrial Commission,* (1942) 380 Ill. 102, 43 N.E. 2d 671; *Jackson* v. *Shuttleworth,* (1963) 42 Ill. App. 2d 257, 192 N.E. 2d 217.

Illinois' courts have recognized an exception to this rule, similar to the federal rule, where the foreign cause of action contains a specified limitation period. In *Smith* v. *Toman,* (1938) 368 Ill. 414, 420, 14 N.E. 2d 498, the Court said:

> Statutes of limitation relate to the question of remedy by fixing a time within which a suit must be brought. Those statutes which create a substantive right unknown to the common law *and in which time is made an inherent element of the right so created,* are not statutes of limitation. (emphasis added)

To the same effect are federal cases that have applied Illinois law in diversity cases:

> An examination of the authorities shows that there is apparent confusion in the decisions as to whether, in a case of this kind, the statute of limitations of the lex loci or that of the lex fori should govern. However, cases holding that the statute of limitations of the state where the cause of action arose should be applied usually involve statutes creating the cause of action, such as for wrongful death, which statutes limit the time in which the statute-created right to sue may be exercised. Restatement Conflict of Laws, Sec. 605, *Anderson* v. *Linton* 7th Cir., 1949) 178 F. 2d 304, 310; See also, *Haefer* v. *Hernden* (5. D. Ill., 1938) 22 F. Supp. 523.

As the District Court pointed out in its opinion, most of these cases seem to be based upon the opinion in *Davis* v. *Mills* (Supra) in which this Court stated:

> The common case is where the statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. But the fact that the limitation is contained in the same section or in the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right. 194 U.S. at 454, 24 S. Ct. at 694.

Based upon this test of construction the district court found that the perpetual limitation period asserted by the plaintiff was not specifically directed to the newly created Yugoslavian liability for the following reasons. First, the court found that the "Law Concerning Treatment of Property . . . taken away from the Owner by the Enemy on its Helpers", which creates the plaintiff's cause of action, was enacted in 1946 without any included time limitation. Second, Article 134(a) of the Criminal Code was enacted in 1965 and was specifically directed to Article 125 of the Criminal Code with no mention of, or reference to, any civil cause of action such as created by Section 1. Third, Section 20 of the Yugoslav statute of limitation was enacted in 1953 and was applicable to *any* civil cause of action which occurred as a result of criminal acts, such as arson, burglary, vandalism and seizure of personal property during wartime,

and was not specifically directed to Section 1. Finally, the court pointed out the perpetual statute of limitation that the plaintiff seeks to impose, must be applied through another statute; Section 20, must be applied through Article 134(a) which in turn was specifically directed only to certain criminal offenses and *not* to the civil action the plaintiff seeks to impose. It is also noteworthy that these laws relied on by the plaintiff were enacted after the cause of action was created by Section 1; Article 134(a) of the Criminal Code was enacted 19 years afterward; and, Section 20 of the Yugoslav statute of limitation was enacted 7 years after Section 1.

These facts led the district court to conclude that Section 20 was not so specifically directed to Section 1 so as to warrant the conclusion that it qualified that section and that, therefore, it was not part of the substantive law. For this reason the procedural law of the forum would apply to bar the action.

Based upon these same observations and case law, the majority of the Court of Appeals felt that Section of the Yugoslav law was so specifically directed to Section 1 as to be a part of the substantive law. The defendant suggests that the majority opinion is in conflict with the existing case law as applied by Illinois courts and federal diversity courts and, along with the dissenting judge and the District Court judge, that allowing the application of the specificity exception in this way would completely nullify the general rule.

II. IF THE YUGOSLAVIAN STATUTE OF LIMITATION DOES APPLY TO THIS CASE AS ALLEGED IN THE PLAINTIFF'S COMPLAINT, THE DISTRICT COURT MUST ADJUDICATE WHETHER OR NOT THE DEFENDANT IS GUILTY OF A VIOLATION OF THE YUGOSLAV CRIMINAL CODE.

Through the attempted use of Section 20 of the Yugoslavian Law Concerning the Statute of Limitations, the plaintiff seeks to circumvent the clear meaning of the applicable sections of the Statute by incorrectly rendering the substance of Section 20 in paragraph 22 of his complaint, and, suggesting that this incorrect version of Section 20 be read together with certain Sections of the Yugoslavian Criminal Code.

Section 20 of the Yugoslavian Law Concerning the Statute of Limitations provides: "If the damage was caused by a criminal act, and a longer period of time was provided for the prosecution of a crime, then an action for the recovery of damages shall be barred when the time for the prosecution of the crime expires." (Translation by George Jovanovich, Library of Congress). The substance of this statute is misrepresented in paragraph 22 of the plaintiff's complaint wherein he pleads that Section 20 applies to "civil actions if the conduct complained of in the civil action *could* subject the defendant to a criminal prosecution". The subtle difference in meaning between what the statute says and what the plaintiff alleges it says produces serious consequences when applied to the situation presented in the instant suit. Accepting the plaintiff's version produces a result wherein the mere accusation of criminal conduct by the plaintiff makes the defendant liable to defend a suit for civil damages when his prosecution for the alleged crimes has never been undertaken or even contemplated.

The unambiguous wording of Section 20 of the Yugoslavian Law Concerning the Statute of Limitations clearly requires a judicial finding that the damage to property allegedly caused by the defendant was done by his criminal act before Section 20 is operable. In this case the criminal act allegedly done was a "war crime" within the meaning of Article 125 of the Yugoslavian Criminal Code. Therefore, in order to apply Section 20 in the instant case the district court would have to adjudicate the defendant to be guilty of crimes within the meaning of Article 125. It would seem to be elementary law that no American court has the jurisdiction, or the disposition to make such a determination. Citations for the proposition that American courts will not enforce the penal laws of other states or countries are numerous. *Moscow Fire Ins. Co. of Moscow, Russia* v. *Bank of New York and Trustees,* (1937) 161 Misc. 903, 294, N.Y.S. 648 (1939) 280 N.Y. 286, 20 N.E.2d 758, Aff.2d 309 U.S. 624; *Chandler* v. *U.S.*, 171 F. 2d 921. *Dougherty* v. *Equitable Life Assur. Soc.* (1934) 266 N.Y. 71, 193 N.E. 897.

It is the defendant's position that before this court could apply Section 20 of the Yugoslavian Statute of Limitations to this action it would have to reach a decision on the applicability of a foreign penal law to the defendant. This would place federal courts in a position in which would be adjudicating foreign war crime statutes in civil causes of action, a situation beyond the jurisdiction of United States Courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

HAYIM KALMICH, *Plaintiff*,

v.

KARL BRUNO, *Defendant*.

No. 74 C 3187.

United States District Court,
N. D. Illinois, E. D.

Oct. 14, 1975.

MEMORANDUM OPINION AND ORDER

FLAUM, District Judge:

This is an action for damages arising from the allegedly tortious seizure the plaintiff's textile business in Belgrade, Yugoslavia in 1942. The plaintiff invokes this court's diversity jurisdiction pleading that he is a citizen of Quebec, Canada and the defendant, Karl Bruno, is a citizen of the state of Illinois. [28 U.S.C. § 1332.] This cause of action is based on a Yugoslavian statute entitled "Law Concerning the Treatment of Property . . . Taken Away From the Owner by the Enemy or its Helpers" which created a civil cause of action for persons whose property was confiscated by the German occupation forces during World War II.

The complaint alleges that in June of 1941, the Field Commander of the German Army in Belgrade issued orders for the seizure of the plaintiff's business to effectuate a general program of confiscation of the Jewish-owned industries of occupied territories. The plaintiff in this cause, Hayim Kalmich, owned a textile business in Belgrade which was allegedly seized by the defen-

dant Bruno in his capacity as a subordinate to the General Plenipotentiary for the Economy of Serbia. The complaint alleges that from June of 1941 until March of 1942, the defendant served as an administrator (Kommisar Leiter) of the plaintiff's business. Thereafter, the defendant allegedly converted and appropriated the plaintiff's business for his own personal use and possession by acquiring it from one Karl Foerster, another official of the General Plenipotentiary for the Economy in Serbia, at less than its actual value. The complaint also alleges that the sole reason for the seizure and confiscation of the plaintiff's business was his religious beliefs and not military purpose or necessity. Subsequent to these events, the defendant allegedly left Yugoslavia and he was located by the plaintiff in this state in 1972.

Four Yugoslavian statutes provide the basis for the cause of action plaintiff seeks to assert in this federal forum. As an analysis of these statutes is critical for the resolution of the pending motions, they are set forth verbatim as pleaded in the complaint.

¶19. That at a time unknown to the Plaintiff but after the termination of World War II the nation of Yugoslavia enacted Article 125 of its Criminal Code which provides that anyone who confiscated belongings of another, during World War II, for non-military purposes, would be subject to criminal prosecution.

¶20. That in 1965, the nation of Yugoslavia enacted Article 134(a) of its Criminal Code which provides that there shall be no statute of limitations upon the prosecutions of violations of Article 125.

¶21. That on or about August 16, 1946 Section 1 of the "Law Concerning the Treatment of Property . . . Taken Away From the Owner by the Enemy or its Helpers" became effective in Yugoslavia, said law providing a civil cause of action for those whose belongings were confiscated by the German occupation force.

¶22. That, in 1953, Section 20 of the Yugoslavian Statute of Limitations, as amended, became effective, said section providing that the statute of limitations upon criminal actions shall serve as the statute of limitations upon civil actions if the conduct complained of in the civil action could subject the defendant to a criminal prosecution.

For purposes of the pending motions these foreign statutes will be taken as true in the form in which they have been pleaded. F.R.C.P. 44.1. *See generally, Crespo* v. *United States,* 399 F.2d 191, 185 Ct.Cl. 127(1968).

[1, 2] Before the court are the defendant's motion to dismiss the complaint and the defendant's motion to strike certain paragraphs of the complaint. The motion to dismiss advances three grounds for dismissal: failure to institute this action within the applicable statute of limitations, failure to join Karl Foerster as an indispensible party,[1] and res judicata by virtue of a previous award of damages in favor of this plaintiff by the Yugoslavian War Crimes Commission in 1946.[2] The

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[1] While not essential to this court's resolution of the pending motions, the court notes that the defendant has failed to demonstrate the indispensability of Karl Foerster pursuant to Rule 19. The complaint does not allege any facts which would indicate that Foerster is necessary for a complete adjudication of the case or that he has a material interest in the subject matter of this suit. *See generally, LeBeau* v. *Libby Owens Ford,* 484 F.2d 789 (7th Cir. 1973); *Eads* v. *Sayen,* 281 F.2d 791 (7th Cir. 1960); *Lubin* v. *Chicago Title & Trust Co.,* 260 F.2d 411 (7th Cir. 1958).

[2] The defense of res judicata cannot be sustained in the absence of evidence that the Yugoslavian award of damages in 1946 involved the same parties, subject matter, and cause of action as the pending litigation. *See, Ray Schools of Chicago* v. *Cummins,* 12 Ill.2d 376, 146 N.E. 2d 42 (1957); *Miller* v. *Shell Oil Co.,* 345 F.2d 891 (10th Cir. 1965).

motion to strike contends that certain paragraphs of the plaintiff's complaint contain extraneous and scandalous matter. For the reasons set forth herein, the court finds the statute of limitations defense to be dispositive, thus the remaining issues in the motion to dismiss and the motion to strike need not be addressed.

[3, 4] A federal court exercising diversity jurisdiction is bound by the substantive law and the conflicts of law rules of the state in which it sits. *Erie Ry. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Thus this court must proceed as would "another court" of Illinois in evaluating the enforcibility and viability of the plaintiff's claim. *See, Allstate Insur. Co.* v. *Charneski,* 286 F.2d 238 (7th Cir. 1960). The enforcibility of a foreign cause of action and the viability of that action under the applicable statute of limitations are distinct issues, thus the two will be examined separately.

Enforcibility

[5-7] Rights of action accruing under foreign law which are transitory, not penal in nature, and which do not violate public policy have been recognized and enforced in the courts of Illinois. *Clubb* v. *Clubb,* 402 Ill. 390, 84 N.E.2d 366 (1949); *Mutual Service Casualty Insur. Co.* v. *Providence Mutual Casualty Co.,* 25 Ill.App.2d 429, 166 N.E.2d 316 (1960). The nature of the instant cause of action is tortious conversion, a transitory claim attaching personal obligation, which under general principles of comity may be enforced against the tortfeasor wherever he is found. *Hanna* v. *Grand Trunk Ry. Co.,* 41 Ill.App. 116 (1891); *United Biscuit Co.* v. *Voss Truck Lines,* 407 Ill. 488, 95 N.E.2d 439 (1950). Although the plaintiff seeks significant monetary damages, the cause of action asserted against this defendant cannot be characterized as penal in nature because it is not equivalent to public vindication of public wrongs. *Huntington* v. *Attrill,*

146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); *Evey* v. *Mexican Central Ry. Co.,* 81 F. 294 (5th Cir. 1897); *Salzman* v. *Boeing,* 304 Ill.App. 405, 26 N.E.2d 696 (1940). *Superior Laundry & Linen Supply Co.* v. *Edmanson-Bock Caterers, Inc.,* 11 Ill.App.2d 132, 136 N.E.2d 610 (1956).

[8] Thus the focal comity issue is whether the recognition of the Yugoslavian Civil action is appropriate according to Illinois public policy considerations.[3] In *Hartness* v. *Aldens, Inc.,* 301 F.2d 228 (7th Cir. 1962) the Seventh Circuit Court of Appeals summarized the Illinois view on the enforcibility of foreign causes of action[4] and adopted the broad comity standard enunciated in *Loucks* v. *Standard Oil Co.,* 224 N.Y. 99, 120 N.E. 198 (1918):

> A foreign statute will generally be enforced even though the forum lacks a similar statute, unless the foreign law is against public policy. Our own scheme of legislation may be different. We may even have no legislation in the subject. That is not enough to show that public policy forbids us to enforce a foreign right . . . The courts are not free to refuse to enforce a foreign right. They do not close their doors unless help would violate some fundamental principle of practice, some prevalent conception of good morals, some deep rooted tradition of the common weal. 120 N.E. at 201-02.

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[3] A federal court exercising diversity jurisdiction must adhere to the articulated public policy of the state in which it sits. *Griffin* v. *McCoach,* 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941).

[4] In this country, courts will generally enforce the law of the place where the injury occurred unless to do so is contrary to the law, morals or policy of the forum. *Chicago & E. & I. RR. Co.* v. *Rouse,* 178 Ill. 132, 52 N.E. 951 (1899). If the relief sought is against the law of the forum state the relief will be denied. *Whitney* v. *Madden,* 400 Ill. 185, 79 N.E.2d 593 (1948).

[9] For purposes of determining the enforcibility of a foreign cause of action, the public policy investigation is not directed toward evidence of positive condonation of that foreign cause of action by statutory or case authority in Illinois. *Millsap* v. *Central Wisconsin Motor Transport Co.*, 41 Ill.App.2d 1, 189 N.E.2d 793 (1963). Rather this inquiry may be framed solely in the negative to determine whether any Illinois statutory or case authority indicates that a civil action for seizure of property during time of war is repugnant or antagonistic to Illinois policy.[5] No authority has been cited by the parties or located by the court which would preclude the maintenance of this action in the forum. However, as the Yugoslavian statute asserted by the plaintiff was enacted subsequent to the acts alleged in the complaint, the possibility that the Yugoslavian statute is retroactive legislation, imposing ex post facto liability antagonistic to Illinois public policy, must be examined.

[10, 11] As a general rule the intended retroactive effect of a statute should be recognized and enforced to the extent that it modifies a pre-existing remedy rather than imposes new liability. *See generally, U.S. Steel Credit Union* v. *Knight,* 32 Ill.2d 138, 204 N.E.2d 4 (1965); *Ogdon* v. *Gianakos,* 415 Ill. 591, 114 N.E.2d 686 (1953). The intended retroactive effect of the statute plaintiff asserts is this forum, the "Law Concerning Treatment of Property . . . Taken Away From its Owner By the Enemy or its Helpers", is clear from the statutory language. (Paragraph 19 of plaintiff's complaint, *supra.*)

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[5] While this court must predicate the determination as to the enforcibility of the Yugoslavian statute upon Illinois public policy, it is interesting to note that the United States has articulated a policy providing for the compensation of losses sustained by American citizens in Europe and Asia during the Second World War. War Claims Act, 50 U.S.C.App. § 2001 et seq. *See also, United States* v. *Hermann Goering.* (Report of the Nuremburg Trials) 6 F.R.D. 73 (1946).

This intended effect may be recognized if the statutory liability is equivalent to a pre-existing, non-codified liability for seizure of personal property during wartime for personal use. The plaintiff's cogent brief on this subject traces the history of American and international law delineating the confiscation rights of belligerent nations. *See, The Prize Cases,* 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862); *The 1907 Hague Convention Articles on Warfare,* 36 Stat. 2277. On this basis the court finds it proper to conclude that the Yugoslavian statute is a codification of a pre-existing liability which is not tantamount to ex post facto legislation. As such, the intended retroactive application of this statute does not offend Illinois public policy.

Accordingly, the court concludes that the Yugoslavian civil action is enforceable in this forum as it is not antagonistic to any articulated Illinois public policy, and it appears to be consistent with generally recognized principles of international jurisprudence.

Viability

Having found that the Yugoslavian civil action may be recognized and enforced in this forum, the court must determine the applicable statute of limitations to ascertain the viability of the plaintiff's claim. The defendant correctly argues that the five year Illinois statute of limitations governing actions to recover damages for injury to real or personal property controls the pending litigation. Ill.Rev.Stat. ch. 38, § 16 (1973). As the plaintiff's claim arose in 1942 the court finds that the five year statute bars the maintenance of this action in this forum.

[12, 13] The bar of the statute of limitations is ordinarily viewed as an affirmative defense which may be raised by motion to dismiss if the applicability of the statute is apparent from the face of the complaint. See generally, *Stanley* v. *Chestak,* 34 Ill.App.2d 220, 180 N.E. 2d 512 (1962); *Anderson* v. *Linton,* 178 F.2d 304 (7th Cir.

1949). Illinois courts have consistently characterized statutes of limitations as procedural, affecting only the remedy and not the substantive rights of the parties. *Jackson* v. *Shuttleworth,* 42 Ill.App.2d 257, 192 N.E.2d 217 (1963). They do, however, distinguish from those statutes which create a right in which time is an element.

> Statutes of limitation relate to the question of remedy by fixing a time within which a suit must be brought. Those statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitation. *Smith* v. *Toman,* 368 Ill. 414, 14 14 N.E.2d 478 (1938).

See also, Shelton v. *Woolsey,* 20 Ill.App.2d 401, 156 N.E. 2d 241 (1959). Illinois courts, and federal courts exercising diversity jurisdiction, have noted that "in those cases where the statute of limitations is not a part of the cause of action . . . it is purely a procedural matter, and is to be governed by the law of the forum." *Haefer* v. *Herndon,* 22 F. Supp. 523 (S.D.Ill.1938). Numerous state and federal cases have espoused this substantive-procedural dichotomy, but few have indicated the rationale for the distinction. The dichotomy has been adopted in rote fashion and the analysis has been reduced to a mechanical investigation as to whether the foreign statute includes a specific time limitation on the exercise of the right.

The first reported analysis of the substantive-procedural dichotomy in selecting the controlling statute of limitations appears in *The Harrisburg,* 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886). The Court held that where "the liability and the remedy are created by the same statutes, . . . the limitations of the remedy are therefore to be treated as limitations of the right". 119 U.S. at 214, 7 S.Ct. at 147. In *Davis* v. *Mills,* 194 U.S. 451, 24 S.Ct. 692, 8 L.Ed. 1067 (1904), Mr. Justice Holmes noted that the distinction between substantive and procedural statutes of limitations may often be the product of judicial characterization rather

than legislative intent. The Court offered the following principle of construction:

> The common case is where the statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. But the fact that the limitation is contained in the same section or in the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right. 194 U.S. at 454, 24 S.Ct. at 694.

The advantage of this approach is that it does not "lead American courts into the necessity of examining . . . the unfamiliar peculiarities and refinements of different foreign legal systems." *Bournias* v. *Atlantic Maritime Co.,* 220 F.2d 152, 156 (2d Cir. 1955). This principle sufficiently protects the interests of the forum state and insures moderate predictability of outcome. The premise underlying this specificity test is one of comity: a court enforcing a foreign statute in derogation of the common law should recognize the express intention of the foreign legislature by enforcing the right with its attendant qualications. *O'Neal* v. *National Cylinder Gas Co.,* 103 F.Supp. 720 (N.D.Ill.1952).

[14] In applying the specificity test to the statutes in the instant case, the court concludes that the Yugoslavian right is not qualified by a Yugoslavian remedy. The civil action created by the "Law Concerning Treatment of Property . . . Taken Away from the Owner by the Enemy or its Helpers" became effective in Yugoslavia in 1946. As plead in the plaintiff's complaint, that statutory right is not conditioned by an included specific time limitation. (Paragraph 21 of plaintiff's complaint, *supra.*) In 1965

the Yugoslavian legislature provided that there shall be no statute of limitations for the criminal prosecution of war crimes. (Paragraph 20 of plaintiff's complaint, *supra.*) That act was expressly directed to criminal prosecutions pursuant to Article 125 of the Yugoslavian Criminal Code, but it did not specifically provide any extension of the statute of limitations for recovery by civil action under Article 134(a). (Paragraph 19 of plaintiff's complaint, *supra.*) The 1953 Yugoslavian Statute of Limitations is facially applicable to any civil action which accrues as the result of acts which would subject the defendant to a criminal prosecution. (Paragraph 22 of plaintiff's complaint, *supra.*) This statute of limitations was enacted seven years subsequent to the civil action created in Article 134(a), without any apparent reference to it. As set forth in the plaintiff's complaint, Section 20 of the Yugoslavian Statute of Limitations appears to be equally applicable to civil actions the result of criminal acts such as arson, burglary, vandalism or seizure of personal property during wartime. Examining the foreign laws as plead in the complaint, the court concludes that the Yugoslavian statute of limitations asserted by the plaintiff is a general statute of limitations, not so specifically directed to the civil action asserted as to warrant a finding that it qualifies that right. *Davis* v. *Mills, supra.*

The court finds that the Yugoslavian statute asserted by the plaintiff is a general statute of limitations, not specifically directed to the plaintiff's cause of action, and under Illinois law, not applicable in the instant case. As the Yugoslavian statute of limitations is not substantive in nature, the procedural statute of limitations of the forum governs.

[15] The plaintiff contends that if the five year Illinois statute of limitations is found to control this foreign action, the doctrine of equitable estoppel should preclude the Illinois defendant from asserting that statute as a bar. The plaintiff argues that one who flees the jurisdiction in which he has allegedly committed a tort to avoid an

action for damages by the injured party,[6] should not be permitted to rely on the statute of limitations defense. Recognizing that no Illinois court has adopted this position, the plaintiff has structured his argument in reliance on precedent from other jurisdictions. A diversity court, as another court of Illinois, should adopt the best or more reasonable approach when ruling on novel state issues. *See e.g., Filley* v. *Kickoff Publishing Co.,* 454 F.2d 1288 (6th Cir. 1972); *Gillam* v. *J. C. Penny Co.,* 341 F.2d 457 (7th Cir. 1965). The court may look beyond the forum state to prudently select the best law of other jurisdictions to govern state novel issues.

The doctrine of equitable estoppel may be applied when "in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Noel* v. *Teffeau,* 116 N.J.Eq. 446, 174 A. 145 (1934). This broad statement may pertain to the instant litigation in light of plaintiff's allegation that the defendant Bruno willfully absented himself from the place where the claim arose to avoid the legal consequences of his acts. However, an examination of the cases relied upon by the plaintiff indicates that no court has held that the defendant's absence alone constitutes grounds for application of the doctrine of equitable estoppel.

[16] *Noel* v. *Teffeau, supra,* involved a statutory duty to notify the party wronged, breach of which precluded the plaintiff from knowing who, not where, the potential defendant might be. In the cases cited by the plaintiff, each defendant materially misrepresented either his identity or his location. *Rudikoff* v. *Byrne,* 101 N.J.Super. 29,

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[6] Paragraph 16 of the plaintiff's complaint alleges:

"That a time unknown to the Plaintiff but before the defeat of the German Occupation army in Yugoslavia, the defendant, to avoid present and frustrate any prosecution for his knowledge, willful and malicious conduct, fled Yugoslavia for places unknown to the plaintiff."

242 A.2d 880 (1968); *Application of Nationwide Mutual Insur. Co.*, 39 Misc.2d 782, 241 N.Y.S.2d 589 (1962); *McCampbell* v. *Southard*, 62 Ohio App. 339, 23 N.E.2d 954 (1937); *Brown* v. *Burke*, 155 Ill. App. 249 (1910). This plaintiff's complaint fails to allege any such misrepresentation, asserting only that the defendant allegedly fled Yugoslavia to avoid the legal consequences of his acts. Further, the interest of the forum in providing a remedy for tortious conduct committed within its jurisdiction was a critical factor in each case relied upon by the plaintiff, which is not present in the pending litigation.

Lastly, the plaintiff argues that *Gill* v. *Gill*, 56 Ill.2d 139, 306 N.E.2d 281 (1974) evidences an inclination by an Illinois court to apply the equitable estoppel doctrine in appropriate circumstances. The estoppel theory in *Gill* arose in the context of post decree child support payments. The plaintiff in *Gill* filed suit thirteen years after the effective date of the divorce decree. The Illinois statutory duty of support has no restrictive statute of limitations, and the defendant relied on the equitable doctrine of laches. The court found that in the absence of evidence that defendant resided in the county or that the plaintiff had knowledge of the defendant's location, general allegations of laches were insufficient to maintain the defense. *See, Pyle* v. *Farrell*, 12 Ill.2d 547, 147 N.E.2d 341 (1958). This court cannot find authority for the extension of the equitable estoppel theory advocated by the plaintiff in the *Gill* case. It is neither factually nor legally analogous to the case under consideration. It cannot be viewed as support for the proposition that an Illinois court would be willing to adopt the estoppel theory advocated by the plaintiff.

Accordingly, the court finds that the applicable Illinois statute of limitations of five years for injury to real and personal property has not been tolled by any established action of the defendant. [Ill.Rev.Stat. (1973), ch. 83, § 23 (1973) (tolling by concealment of the existence of a cause of action).] As the plaintiff's cause of action arose in 1942, the maintenance of this claim in an Illinois forum is barred.

[17, 18] The plaintiff has suggested that the issues of this case are governed by the conflicts rule enunciated in *Ingersoll* v. *Klein*, 46 Ill.2d 42, 262 N.E.2d 593 (1970) that the "law of the place where the injury occurred should determine the rights and liabilities of the parties, unless Illinois has a more significant relationship with the parties in which case the law of Illinois should apply". 262 N.E. 2d at 595. In the five years since *Ingersoll* adopted the "most significant relationship" test,[7] Illinois courts have uniformly applied that conflicts rule in the determination of rights and liabilities in the areas of capacity, guest statutes, and standards of care. No Illinois court has indicated that *Ingersoll* in any way affects the long standing Illinois statute of limitations substantive-procedural dichotomy, and no Illinois court has applied *Ingersoll* as the touchstone in a choice of statute of limitations analysis. One federal court has hinted at the potential use of *Ingersoll* in choice of statutes of limitations issues, but noted that "*Ingersoll* does not speak to the issues of where and when a cause of action arises, but rather goes to the question of what substantive law shall govern it." *Klondike Helicopters Ltd.* v. *Fairchild-Hiller Corp.*, 334 F. Supp. 890, 894 (N.D.Ill.1971).[8] This court recognizes that the application of the *Ingersoll* rule could require a different result in this statute of limitations analysis, as the complaint does not indicate that this cause would be barred in Yugoslavia. However, the diversity court must hesitate in extending the law of the forum state in the absence of some indication from the courts of the forum that the extension would be desirable. This court is again faced with the resolution of a novel state issue, and finds that the extension of *Ingersoll* to govern the choice of the statute of limitations is neither the best law nor the more reasonable rule.

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[7] American Law Institute, Second Restatement of Conflict of Laws § 379.

[8] The court concluded "However, even if we were to apply *Ingersoll* to determine what statute of limitations to apply, the result would be the same." 334 F.Supp. at 894.

Without attempting to summarize the entire body of developing law in this area, the court notes that the few cases which have applied the "most significant relationship" approach in the choice of the applicable statute of limitations, have adopted that analysis to achieve the result of a borrowing statute. *Farrier* v. *May Dept. Store Co.*, 357 F.Supp. 190 (D.D.C.1973); *Heavner* v. *Uniroyal Co.*, 63 N.J. 130, 305 A.2d 412 (1973). These cases use the Second Restatement approach to preclude the maintenance of an action in the forum by applying the shorter limitations period of the state where the cause of action arose. This analysis accomplished the objective of minimizing forum shopping, which is provided for in other states by a borrowing statute. Thus states which lack a legislative directive have attempted to achieve the desired result by judicial remediation. As Illinois has a borrowing statute, the persuasiveness of these two cases is minimized. [Ill. Rev.Stat. ch. 83, § 21 (1973)].

The court has located only one case which has unequivocally adopted the Second Restatement approach in the choice of the statute of limitations analysis. In *Horton* v. *Jessie*, 423 F.2d 722 (9th Cir. 1970) the Ninth Circuit Court of Appeals concluded summarily that "[u]nder the California significant contacts approach, we find too little Missouri contacts and too many in California to apply the Missouri statute." A subsequent district court decision refused to "place dispositive reliance on the brief per curiam opinion" finding that it would "hardly comport with this court's obligation under *Erie R. R. Co.* v. *Tompkins*, supra, to transmute *Horton* into an authoritative revision of California law." *Klingebiel* v. *Lockheed Aircraft Corp.*, 372 F.Supp. 1086, 1090 (N.D.Col.1971). In *Klingebiel* the district court held the California statute of limitations to control a foreign wrongful death action governed by German substantive law. The court's opinion as to the applicability of the California statute was premised on the substantive-procedural analysis, specifically rejecting the Second Restatement approach in the choice of the controlling statute. In affirming the district court

decision, the Ninth Circuit implicitly rejected the broad language of *Horton*:

> Judge Zirpoli stated that *Horton* v. *Jessie*, 9 Cir., 1970, 423 F.2d 722, "adopts a 'significant contacts' approach" in applying the California statute of limitations. *Horton* was not an attempt at an "authoritative revision of California law." In *Horton* we did not reach the issue of whether or not the substance-procedure dichotomy was still viable in California. There was no need to do so because it was clear that regardless of the approach taken the California statute of limitation applied. *Klingebiel* v. *Lockheed Aircraft Corp.*, 494 F.2d 345, 347 (9th Cir. 1974).

The circuit court's retreat in *Klingebiel* from the Second Restatement approach adopted in *Horton* cautions this court in the formulation of Illinois policy.

This court has found no authority to support the plaintiff's argument that the extension of the *Ingersoll* approach to the selection of the applicable statute of limitations is the preferable rule. As Illinois has enacted a borrowing statute the Second Restatement approach is not necessary to achieve the borrowing statute result in this forum. Further the court finds that adopting the Second Restatement approach would jeopardize the measure of predictability of outcome guaranteed by the substantive-procedural analysis, while minimizing the impact of the interests of the forum state. *See, Wurfel, Statutes of Limitations in the Conflict of Laws*, 52 N.Carolina L.Rev. 489, 560-67 (1974). In resolving this novel state issue, this diversity court finds that the *Ingersoll* most significant relationship approach should not be extended to include the choice of applicable statute of limitations. Although Yugoslavian law may well have governed the substantive issues of this lawsuit, the court finds that the Illinois statute of limitations precludes the maintenance of this action in this forum. *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856, 97 L.Ed. 1211 (1953).

[19, 20] The defendant has also argued that two sections of the Yugoslavian statute of limitations[9] would bar the maintenance of this action in Yuglosvia, and as a result this claim is barred in an Illinois forum by the Illinois Borrowing Statute. Ill. Rev. Stat. ch. 83, § 21 (1973). Assuming, *arguendo,* that the courts were to take cognizance of the additional Yugoslavian statutes submitted by the defendant in support of the motion to dismiss but not plead by the plaintiff in the complaint, the court finds that the defendant's analysis has placed the cart before the horse. The Illinois Borrowing Statute is not a choice of law formulation. It is a rule of exclusion whereby actions brought in an Illinois forum, not barred by the applicable Illinois statute of limitations, are denied enforcement if barred by the statute of limitations of the place where the cause of action arose. *Speight* v. *Miller,* 437 F.2d 781 (7th Cir. 1971); *Sarro* v. *Maupin,* 127 Ill. App. 2d 26, 261 N.E. 2d 756 (1970); *Manos* v. *Trans World Airlines,* 295 F. Supp. 1166 (N. D. Ill. 1969). As this court has concluded that the Illinois statute of limitations governs this action, and the Illinois statute bars the maintenance of this cause in this forum, the Borrowing Statute is inapplicable.

Summarizing, the court finds that the Yugoslavian civil cause of action plaintiff asserts in this diversity action could be recognized and enforced under the public policy considerations of the state of Illinois. However,

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[9]Section 14 of the Law Concerning Statute of Limitations provides:

> "Claims shall be barred after the expiration of a ten year period, unless specifically provided for by law."

Section 19 of the Law Concerning Statute of Limitations provides:

> "Actions for the recovery of damages shall be barred after the expiration of three years after the plaintiff learned of the damage and the person causing it. In any event such action shall be barred after the expiration of ten years after the day the cause of action occurred."

the court further finds that this action is not viable as the applicable Illinois statute of limitations bars the maintenance of this action in this forum. The plaintiff has not demonstrated that the five year statute has been tolled pursuant to Illinois law, and the court finds the equitable estoppel doctrine advanced by the plaintiff to be inappropriate. Accordingly, the defendant's motion to dismiss is hereby granted, with party to bear its own costs.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 76-1882

HAYIM KALMICH,

Plaintiff-Appellant,

vs.

KARL BRUNO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois.

No. 74 C 3187—JOEL M. FLAUM, *Judge.*

ARGUED JANUARY 11, 1977—DECIDED APRIL 25, 1977

Before FAIRCHILD, *Chief Judge,* SWYGERT and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* This is a diversity case between plaintiff-appellant Hayim Kalmich, a citizen of Quebec, Canada, and defendant-appellee Karl Bruno, a citizen of Illinois. The district court, sitting in Illinois, dismissed the complaint for failure to state a cause of action on the basis that the claim was barred by the pertinent Illinois statute of limitations.[1] Kalmich seeks reversal on the grounds that the district court should have applied the longer statute of limitations of Yugoslavia, where the cause of action arose, that Bruno should be estopped to

[1]The district court's Memorandum Opinion and Order of October 14, 1975, is reported at 404 F. Supp. 57. An unreported Memorandum Opinion of June 25, 1976, denied Kalmich's motion to alter judgment, and an amendment to that opinion and order, dated July 13, 1976, granted leave to file a second amended complaint and dismissed same because it also was time barred. Thus it is the second amended complaint which is before us.

plead the statute of limitations in any event, and that one count of the complaint states an equitable claim not subject to the statute of limitations, but only to a laches defense which, it is asserted, does not apply to this case.

I.

In reviewing the district court's dismissal of Kalmich's complaint, we assume the truth of these facts well-pleaded in that complaint. In 1941, Kalmich, a Jew, resided in Belgrade in his native Yugoslavia and operated and owned a textile importing business. In April of that year, the armies of Nazi Germany invaded and conquered Yugoslavia, forcing the incumbent government of Yugoslavia into exile.[2] The occupation forces shortly installed a General Plenipotentiary for the Economy in Serbia, whose responsibility was to "Aryanize" the economy by seizing and confiscating all businesses and property owned by Jews, solely because they were Jews.

Bruno is alleged to have voluntarily subordinated himself to the General Plenipotentiary,[3] and when an order

[2]The complaint also alleges that the government-in-exile was at all times while in exile recognized by the United States as the lawful and sovereign government of Yugoslavia.

[3]In the statement of the case in his brief, Bruno adverts to his vigorous objections in the district court to accusations that the defendant's conduct was motivated by religious bigotry. The defendant's motion to strike these allegations as scandalous was not reached by the district court in view of its disposition of the case. The complaint basically alleges that the conquering government in which defendant of his own free will participated seized the plaintiff's business solely because of his religious beliefs. Despite some recent belated apologists for the Nazi regime, we entertain no doubt that substantial confiscation of businesses did occur as alleged, and that such allegations constitute a proper part of the case plaintiff is attempting to pursue. He, of course, if permitted to pursue his case will have to come forward with proof to support these allegations.

for the seizure of Kalmich's business was issued on June 24, 1941, Bruno was given the duties of managing and operating the business. He seized the business and proceeded to run it. In March of 1942, Bruno substantially understated the value of the business to his superiors to enable him to purchase it from them at a bargain price. That same month, he bought the business from the General Plenipotentiary for even less than the value he had previously stated. Thereafter, he resold the business to one Guc, presumably at a profit.

The complaint alleges that sometime prior to the defeat of the German occupation forces in Yugoslavia, Bruno "to avoid, prevent and frustrate any prosecution for his knowingly willful and malicious conduct, fled Yugoslavia for places unknown to the Plaintiff." After the end of the war, Kalmich spent substantial time, money, and effort unsuccessfully attempting to find Bruno for redress in a search that covered five countries. It was only in May of 1972 that Kalmich discovered, from sources not disclosed, that Bruno was living in Chicago, Illinois. This lawsuit followed.

Count I of the complaint seeks damage recovery under statutory provisions of Yugoslavian law which are summarized therein to provide the notice of foreign law issues required by Rule 44.1 Fed.R.Civ.P. One general provision referred to in the complaint is a broad repeal of all statutes, ordinances, decrees, and regulations enacted prior to the date of the Nazi invasion, and all those enacted by the Nazi occupation forces; presumably this repeal provision was an attempt to clean the slate for new laws enacted after the war. The remaining statutes, and their interrelationships, are important to the disposition of this case, and the pertinent paragraphs of of the complaint summarizing these are therefore set out in full:

> 23. That at a time unknown to the Plaintiff but after the termination of World War II the nation of Yugoslavia enacted Article 125 of the Criminal Code [Article 125] which provides that anyone who confiscated belongings of another during World War II, for nonmilitary purposes, would be subject to criminal prosecution.
>
> 24. That in 1965, the nation of Yugoslavia enacted Artice 134(a) of its Criminal Code [Article 134(a)] which provides that there shall be no statute of limitations upon the prosecution of those accused of violations of Article 125.
>
> 25. That on or about August 16, 1946, Sec. 1 of the Law Concerning the Treatment of Property . . . . Taken Away From the Owner by the Enemy or its Helpers [Section 1] became effective in Yugoslavia, said Law providing a civil cause of action for those whose belongings were confiscated by the German occupation force.
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> 26. That, in 1953, Section 20 of the Yugoslavian Statute of Limitations, as amended [Section 20], became effective, said Section providing that the statute of limitations upon criminal actions shall serve as the statute of limitations upon civil actions *if the conduct complained of in the civil action could subject the Defendant to a criminal prosecution.*

Actual damages, interest, and punitive damages totalling $1,826,208, plus costs and any post-judgment interest were sought.

Count II of the complaint, referring generally to the allegations of Count I, asserts that Bruno obtained Kalmich's property (the business) in an unlawful and tortious manner, and seeks recovery under a constructive trust theory in the same amounts as mentioned above, plus all profits and proceeds received by Bruno from his possession and sale of the business.

II.

In considering the issues raised, we note at the outset the defendant's contention that in determining whether

the district court misconceived or misapplied state law the appellate court is limited to determining whether or not the district court made permissible interpretations of the applicable state law, citing *Harris* v. *Hercules, Incorporated,* 455 F.2d 267, 269 (8th Cir. 1972). The defendant further contends that the reviewing court will not reverse a determination on the part of a federal district court judge of the local law of his state unless there is a firm conviction that it was clearly erroneous, citing *Harris* and *Hogue* v. *Pellerin Laundry Machinery Sales Company,* 353 F.2d 772, 776 (8th Cir. 1965).

We have no particular quarrel with these contentions nor with the assertion that under the circumstances described we should give deference to the district court judge's determination of local law. Here, however, in our opinion the ultimate resolution of the appeal turns upon the determination not only of Illinois law but also that of Yugoslavia, a "foreign country" under Rule 44.1, Fed.R. Civ.P. Irrespective of the deference to which a district court judge's determination of the local law is entitled, we regard the matter of foreign country law as purely a "question of law," as it is characterized in Rule 44.1, the resolution of which we are free to arrive at on the basis of our own independent research and analysis. For a general discussion of the scope of appellate review under Rule 44.1, see 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2446, at 414-15 (1971).

III.

In diversity cases, of course, a federal court applies the substantive law of the state in which it sits. *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938). Where the laws of more than one jurisdiction are at least arguably in issue, the *Erie* reference to the law of the forum state includes that state's choice of law rules. *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.,* 313 U.S. 487 (1941); *Griffin* v. *McCoach,* 313 U.S. 498 (1941).

We think it clear, and neither party disagrees, that the Illinois courts would choose to apply the substantive laws of Yugoslavia to this case. Yugoslavia was the site of the tort and the injury, and we can think of no argument that would demonstrate that Illinois has a more significant relationship with this case than has Yugoslavia. *See Ingersol* v. *Klein,* 46 Ill. 2d 42, 262 N.E. 2d 593, 595 (1970). Moreover, the district court's cogent analysis, 404 F. Supp, at 61-63, demonstrates beyond any real question that this is the type of foreign cause of action that the courts of Illinois will enforce. *See generally Hartness* v. *Aldens, Inc.,* 301 F. 2d 288 (7th Cir. 1962); *Clubb* v. *Clubb,* 402 Ill. 390, 84 N.E. 2d 366 (1949). Although only Count I is expressly rooted in Yugoslavian law, these conclusions apply with full force to Count II as well. Even if Illinois courts would apply the principles of Illinois equity jurisprudence to Kalmich's constructive trust theory, the underlying premise of the theory, the asserted unlawfulness and tortiousness of Bruno's seizure of Kalmich's business, would have to be measured by Yugoslavian law. *See Ingersoll* v. *Klein, supra.*

The choice of the applicable statute of limitations poses a different, and, in this case, a more difficult problem. State law barring an action because of a statute of limitations is sufficiently "substantive," in the *Erie* sense, that a federal court in that state exercising diversity jurisdiction must respect it. *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). Illinois has a five year statute of limitations governing actions for damages for injury to real or personal property. Ill. Rev. Stat. 1975, ch 83, § 16. As pleaded in the complaint, Yugoslavia's statute of limitations applicable here appears to be perpetual. The question then, if not the answer, may be simply put: which statute of limitations should be applied under Illinois' choice of law rules?

The basic choice of law rule pertaining to statutes of limitations, in Illinois as elsewhere, is that such statutes

are "procedural in their nature," *Hilberg* v. *Industrial Commission,* 380 Ill. 102, 105, 43 N.E. 2d 671 (1942), that they "generally affect only the remedy and not substantive rights," *Jackson* v. *Shuttleworth,* 42 Ill. App. 2d 257, 260, 192 N.E. 2d 217 (1963); *Wetzel* v. *Hart,* 41 Ill. App. 2d 371, 374, 190 N.E. 2d 619 (1963), and, thus, that the limitations statutes of the forum will usually apply, even though the causes of action to which they are applied may have arisen in and been governed by the substantive law of another jurisdiction. *Id.*

An exception, however, is recognized in certain circumstances where the foreign cause of action is statutorily based. As the Illinois Supreme Court noted in *Smith* v. *Toman,* 368 Ill. 414, 420, 14 N.E. 2d 478 (1938).

> [T]his court has given consistent recognition to the principle that where [a] statute creates a right that did not exist at common law and restricts the time within which the right may be availed of, or otherwise imposes conditions, such statute is not a statute of limitation [in the normal sense] but *the time element is an integral part of the enactment.* [Emphasis supplied.]

Accord, Shelton v. *Woolsey,* 20 Ill. App. 2d 401, 404, 156 N.E. 2d 241 (1959). Neither *Smith* nor *Shelton* were choice of law cases; in both the principle was articulated because helpful in resolving analogous questions of Illinois law. *Jackson* v. *Shuttleworth, supra,* 42 Ill. App. 2d 259, states the rule in a choice of law context:

> It is true that a number of decisions in the federal courts have held that the statute of the state wherein the cause of action arose is the applicable statute, but an examination of those cases discloses that the statutes involved were not strictly statutes of limitation, but were statutes creating the cause of action and limiting the time in which such newly created right might be asserted. Where the right of action depends upon statutes and where no such right of action existed at common law, the time for bringing action is determined by the lex loci, because *the lex loci establishes the substantive rights of the parties, and where a limitation is placed upon the assertion of that right, it has been correctly held to be a matter of substantive, as distinguished from procedural, law. Haefer v. Herndon,* 22 F. Supp. 523 [S.D. Ill. 1938]. [Emphasis supplied.]

To the same effect, *see Anderson* v. *Linton,* 178 F. 2d 304, 310 (7th Cir. 1949); *O'Neal* v. *National Cylinder Gas Co.,* 103 F. Supp. 720, 725 (N.D. Ill. 1952).

Stated in the forms just quoted, the exceptional rule allowing the application of the statute of limitations of the locus of the tort *does not quite fit this case, for the Yugoslavian statute creating the right sued upon does not create its own limitation.* Although disagreeing as to the correctness of its application, the parties do agree that the district court correctly utilized a somewhat broader rule, suggested by Mr. Justice Holmes' opinion for the Court in *Davis* v. *Mills,* 194 U.S. 451, 454 (1904), in which it was said:

> [T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*

This "specificity" test has previously been used in applying Illinois law, *see O'Neal* v. *National Cylinder Gas Co., supra,* and we also agree that the question of whether a foreign statute of limitations goes to the substance of a foreign right cannot sensibly turn on matters of pure form. *See also* 25 I.L.P. *Limitations* § 4, at 180 (1956).

We note a problem not addressed by the parties or the district court. In *O'Neal, supra,* the court found the locus statute of limitations specifically directed to the locus statutory right, and applied it instead of the shorter Illinois limitation. In *Anderson* v. *Linton* and *Jackson* v. *Shuttleworth,* both *supra,* the courts applied the shorter Illinois limitation solely because the longer locus limitation was not part and parcel of a locus statutory right. It could be argued, nonetheless, that a specifically directed statute of limitations of the tort locus jurisdiction should be honored only when it is shorter than the forum's statute. *See* Comment, 1962 U.ILL. L.F 452 (1962); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142, 143 (1971); RESTATEMENT OF CONFLICT OF LAWS §§ 603, 604 (1934); *Kenney* v. *Trinidad Corporation,* 349 F. 2d 832, 839 (5th Cir. 1965); *Zellmer* v. *Acme Brewing Co.,* 184 F. 2d 941, 943 (9th Cir. 1950).

The controlling premise of such an argument would be that statutes of limitations are considered "procedural" because they reflect basically procedural concerns of the forum: discouraging plaintiffs from sleeping on their rights, and limiting the use of the forum's courts to cases in which it is thought that the matters in question are fresh enough to allow a fair rendering of justice. The fact that a foreign jurisdiction has enacted a statutory right with a long specific limitation would, according to this argument, provide no basis for overriding the forum's important interests in the integrity of its judicial system. Where the specific limitation is shorter than that which the forum provides for, it may be said that there remains no right for the forum to enforce, even though the forum would otherwise be willing to enforce one.

The major premises of the contrary argument would be these: where the forum's choice of law rules point to another jurisdiction, that jurisdiction's law governs the substantive rights of the parties; a general statute of limitations of the locus jurisdiction reflects only the

locus' procedural concerns for its courts, and need not concern the forum; a specific limitation, on the other hand, goes to the substance of the foreign right and should be applied in the forum.

The language emphasized in the quotations *supra* from *Smith* v. *Toman* and *Jackson* v. *Shuttleworth* tends to support this latter conceptual approach, but it would be less than candid to say that the analytic problem posed has been definitely resolved in Illinois. Because the approach implicitly adopted by the district court does find support in *Smith, O'Neal,* and *Jackson,* and because Bruno agrees that the district court utilized the proper test, we do not find it necessary to take the matter any further. The statute of limitations in Illinois is, after all, a waivable personal privilege. *Massman* v. *Duffy,* 330 Ill. App. 76, 69 N.E. 2d 707 (1946).

We turn to the question of whether the district court properly applied this 'specificity" test. In support of its conclusions that the pertinent Yugoslavian statute of limitations is not specifically enough directed to the statutory cause of action to have become part of the substance of the action, the district court advanced three reasons. *First,* no specific time limitation is included in Section 1 (the provision establishing the civil cause of action). The district court properly placed no substantial reliance on this factor; if the limitation *had* been within Section 1, there would have been no reason to use the "specificity" test which the district court was applying, for the case would have fallen squarely within the rule of *Jackson* v. *Shuttleworth, supra. Second,* the district court emphasized that Section 20 (providing that civil actions grounded on criminal acts may rely on the limitation applicable to criminal prosecution of such acts) was enacted seven years after Section 1, without any specific reference thereto, and that Section 20 applies broadly to all civil actions based on criminal acts, subject only to the proviso that the conduct complained of in the civil action could subject the civil suit defendant to a criminal

prosecution. *Third,* the court noted that Article 134(a) (establishing a perpetual statute of limitations for five specific criminal provisions aimed at genocide and war crimes, one of which is Article 125, criminalizing the conduct complained of here) specifically applies only to criminal prosecutions, and does not in terms extend civil statutes of limitations.

These statements, while accurate, do not lead us to the conclusion reached in the district court. In our opinion Section 20 and Article 134(a), read together, demonstrate a connection between the Yugoslavian limitation provision that is adequately specific to warrant honoring the perpetual limitation in this case.

If adequate specificity exists, it cannot matter that various of the Yugoslavian statutes involved were enacted at different times. *Davis* v. *Mills, supra,* 194 U.S. at 456. Likewise, the fact that Section 20 must be applied through another statute, Article 134(a), does not weaken Kalmich's claim of specificity. Hypothetically, if Section 20 allowed the use of criminal limitations periods *only* in civil actions based on war crimes under Article 125, it is inconceivable that the reference to Article 134(a) that would be required to see what the criminal limitation was would flaw the otherwise obviously specific nature of Section 20.

Of course, as the district court recognized, Section 20, *standing alone,* is not nearly this specific. Even if it were assumed, however, that Section 20 viewed on its own would fail the specificity test, *but see Maki* v. *George R. Cooke Co.,* 124 F. 2d 663, 666 (6th Cir. 1942), *cert. denied,* 316 U.S. 686, once Article 134(a) was enacted, the situation changed. At that time, specific war crimes became different from ordinary crimes, and specifically so, because they were not subject to statutes of limitations in criminal prosecution. Also at that time, causes of action based on the specific crimes because different from other crime-based causes of action, for the same reason. Article 134(a)'s treatment of war crimes for

criminal purposes carried into Section 20 by necessary implication.[4] That this effect was not made express in Article 134(a) and results only by reading that statute with Section 20 does not, as has been seen, make the effect any less specific. *So far as appears, war crimes referred to in Article 134(a), and only those crimes, were made perpetually punishable, and causes of action based on these crimes, and only such causes of action, were made perpetually actionable.* The limitations provisions of Yugoslavia were sufficiently and specifically part and parcel of the substance of the Yugoslavian statutory right, and the district court erred in refusing to apply them.

Nor, as a final matter, do we find any disturbing aspect contrary to Illinois public policy in the fact that litigation is being allowed some thirty years after the events on which the claim for recovery is based. This is true notwithstanding our earlier reference to a policy argument of limitation of the use of the forum's courts to cases in which it is thought that the matters in question are fresh enough to allow a fair rendering of jus-

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[4]This conclusion is supported by the opinion letter of Kalmich's Yugoslavian law expert. The parties are in controversy over the proper role of this letter in the case. Kalmich argues that the district court was bound by the conclusions of this unsworn, un-cross-examined letter, simply because it was the only expert opinion tendered in the case. Bruno argues that it should not have been offered or considered because it was first offered in support of Kalmich's motion to alter judgment and it would not be admissible in evidence. Both arguments are plainly wrong under Fed. R. Civ. P. 44.1. As material relevant to the question of law as to foreign law, it was properly offered even at the late date it was offered, and properly considered both in the district court and in this court. As is evident from the text, we take a different view of the relevance of the conclusion that Article 134(a) implicitly extended the Section 20 limitation provision than did the district court.

tice. Policy also is involved because of the desirability of discouraging litigants from sleeping on their rights. There would appear to be no aspect of sleeping on rights here and as far as the freshness aspect is concerned, Illinois, as is the case probably in most states, statutorily recognizes circumstances which would permit access to the courts of its state notwithstanding a lapse of time which could be very substantial and which could under some circumstances even exceed that involved in the case before us. Thus, the statute of limitations is tolled in certain circumstances by the absence of the defendant from the state. Ill. Rev. Stat. 1975, ch. 83, § 19. Similarly the statute is tolled if the person entitled to bring an action is at the time of the accrual of the cause of action an infant under 18 years of age, is insane or mentally ill, or is imprisoned on a criminal charge, the tolling continuing for two years beyond the removal of the disability. Ill. Rev. Stat. 1975, ch. 83, § 22.

Our disposition of this case makes it unnecessary to consider Kalmich's argument that Bruno should have been estopped to assert the statute of limitations. Likewise, we see no reason to evaluate Kalmich's argument that Count II of the complaint states an equitable claim not subject to the statute of limitations defense. In the portion of his brief supporting his constructive trust theory, the plaintiff concedes that an action may be maintained in equity only if the remedy at law is inadequate. Our holding here, of course, permits plaintiffs to proceed at law subject, as always, to the requirement of proof of all material matters.

For the reasons set forth in this opinion, the judgment of the district court dismissing Kalmich's complaint is reversed and remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

SWYGERT, *Circuit Judge,* dissenting. I respectfully dissent. In my opinion the district court correctly analyzed the issues in this case and its judgment should be affirmed.

The lynchpin of the majority's reasoning is that Article 134(a) constituted a specific limitation on the substantive rights created by Section 1. I cannot agree. The statute of limitations for Section 1 remained Section 20, anod Section 20, as the district court held, "is a general statute of limitations, not specifically directed to the plaintiff's cause of action . . ." The majority's analysis might be correct if Section 20 tracked Article 134(a) by stating that the statute of limitations for civil actions was the same as the statute of limitations for criminal actions where the conduct complained of constituted one of the war crimes enumerated in Article 134(a). But Section 20 does not do so. It is applicable to both war crimes and ordinary crimes.

In order to determine what the statute of limitations would be in this case if it were brought in Yugoslavia, it is necessary to look at both Section 20 and Article 134(a). But this fact does not turn Section 20 into a statute specifically directed toward qualifying the substantive rights conferred by Section 1. Section 20 is applicable in Yugoslavia in a broad range of cases that have nothing to do with Section 1 or war crimes. For example, if plaintiff sued defendant in Yugoslavia for damages based on conduct in 1971 which would constitute arson under Yugoslavian law, Section 20 would direct a Yugoslavian court to look to the statute of limitations for the crime of arson. Under the majority's reasoning, an Illinois court should also use the Yugoslavian statute of limitations for arson because the existence of a specified statute of limitations for that crime sets it apart from other crimes. The majority would consequently have the "specificity" exception swallow the general rule.

Therefore, I cannot say that Section 20 is a specific limitation on Section 1 simply because Article 134(a) focuses on war crimes. Since Section 20 is a general statute of limitations, it is inapplicable in this case.